United Pulse Trading, d/b/a AGT Foods *and* Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL–CIO, Local No. 167G. Case 18–CA–242003

June 10, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND EMANUEL

On March 31, 2020, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a combined supporting brief and an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1.

The Respondent has operated a facility since 2013 that processes and distributes peas, lentils, chickpeas, and other dry beans. In February 2019, the Union filed a petition to represent all full-time and regular part-time production and maintenance employees and plant clerical employees there. After the filing of the representation petition, the Respondent communicated to employees that performance reviews would be suspended and would be resumed once the union representation issue had been resolved. The Respondent's managers told some employees that the Respondent was not able to grant merit pay increases during the pendency of the Union's petition because such raises could be misconstrued as bribes.[1]

The General Counsel alleged that because the Respondent had a regular "practice of giving employees annual reviews and associated wage increases," it violated Section 8(a)(3) and (1) by failing to continue these practices in the spring of 2019. The judge found that the Respondent violated the Act by failing to issue performance reviews, but not by withholding merit pay increases.

2.

We adopt the judge's dismissal of the allegation involving merit pay increases,[2] but reverse and find that the Respondent did not violate Section 8(a)(3) and (1) by failing to issue performance reviews in the spring of 2019 as alleged in the complaint. When an employer during an organizing campaign departs from its usual practice of granting or withholding benefits, the Board may infer an intent to influence the upcoming election, absent an explanation of a lawful reason for the departure.[3] Accordingly, an employer acts at its peril when it grants or withholds increases in economic benefits during the pendency of a union organizational campaign.[4] But the Board will not find that an employer has departed from its usual practice of granting a benefit unless the granting of that benefit was "preordained through either unmistakable promise or fixed cycle," or "reasonably coextensive with a clearly defined pattern."[5]

Here, we find that the General Counsel has not established that the Respondent's failure to issue performance reviews as alleged in the complaint constituted a departure from its usual practice. Specifically, the General Counsel has failed to show that the Respondent issued performance reviews with any regularity or pattern. Although the judge found that performance reviews "occurred every year almost always in the spring," the record evidence does not support this conclusion. The General Counsel's evidence relates primarily to performance reviews issued in 2017 and 2018, with only sparse evidence of reviews issued in each prior year. And the reviews in the record—which include both 90-day reviews as well as "annual" reviews—do not establish the existence of a regular practice of giving annual performance reviews nor do they support a finding that these reviews were given at the same time each year.[6] Accordingly, we conclude that the General Counsel has failed to establish that the Respondent issued performance reviews pursuant to "clearly defined pattern

1 A representation election was scheduled for March 8, 2019, but was never conducted.

2 In adopting the judge's dismissal, we find it unnecessary to rely on his finding that the Respondent abandoned its annual merit wage increase program in 2018, as the record makes clear that the General Counsel failed to establish generally that the Respondent had a regular, clearly formulated practice of awarding merit pay increases.

3 *Parma Industries*, 292 NLRB 90, 91 (1988).

4 *Pacific Southwest Airlines*, 201 NLRB 647, 647 (1973), enfd. 550 F.2d 1148 (9th Cir. 1977).

5 *Somerset Welding & Steel*, 304 NLRB 32, 47 (1991), remanded on other issue 987 F.2d 777 (D.C. Cir. 1993). See also *Pacific Southwest Airlines*, supra, 201 NLRB at 647 ("[T]he withholding of increased benefits, the mechanics and resolution of which have not been finally formulated, have also not been found violative of the Act.").

6 An employee of the Respondent, in testifying that he had not received a review in over 2 years, agreed with the assertion that issuance of reviews was "all over the board," and that this inconsistency elicited complaints from employees.

or past practice,"[7] and that the Respondent therefore did not violate Section 8(a)(3) and (1).[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 10, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joseph H. Bornong, Esq., for the General Counsel.
Jonathan M. Sutton, Esq. (Sutton and Associates), of Oklahoma City, Oklahoma, for the Respondent.
Elce Redmond, International Representative, Bakery, Confectionary Tobacco Workers and Grain Millers International Union (BCTGM), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Minot, North Dakota, on January 29, 2020. Local 167G of the Bakery, Confectionary Tobacco Workers and Grain Millers International Union (BCTGM) filed the charge in this matter on May 22, 2019, and the General Counsel issued the complaint on August 29, 2019.

The General Counsel alleges that Respondent United Pulse Trading/AGT violated Section 8(a)(3) and (1) of the Act in the spring of 2019 by withholding its practice of giving employees annual performance reviews and associated wage increases after the Union filed a representation petition. As set forth below, I conclude that AGT did not violate the Act by ceasing annual merit increases but did violate the Act in ceasing to give unit employees annual performance reviews.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has a facility in Minot, North Dakota, at which it processes dry peas, lentils, chickpeas, and other dry beans. During 2018, Respondent sold and shipped goods valued in excess of $50,000 from its Minot facility directly to points outside the State of North Dakota. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 167G of the BCTGM is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

AGT purchased its facility in Minot, North Dakota, in 2012. It began distributing product, i.e. lentils, from this facility in 2013. Between 2013 and 2018, AGT typically gave new employees a 90-day review and many and possibly all other employees an annual performance review and a wage increase depending on the outcome of that review (Tr. 114). The timing of the increases was erratic. They did not always occur at 90 days or a year after the prior review and/or wage increase.

However, the annual reviews were generally performed between April and June. A chart attached to General Counsel's Exhibit 20 (pp. 135–136 of the electronic exhibits) has a list of the last annual review date for 52 employees.[1] The vast majority (41 of 52 by my count) of these reviews in 2018 were performed between April 1 and June 30, 2018. Several others were performed in March and several of those performed later in the year were for employees hired in 2018. Other exhibits establish that prior to 2018 the annual reviews were generally performed in the spring.

In addition to annual merit raises Respondent implemented a qualification card (qual card) program, which allowed employees to get raises of 25 (initially) or 50 cents an hour if they are able to demonstrate competence in certain tasks.[2] In this program, in contrast to the annual review practice, the employee must take the initiative to get a wage increase by doing something beyond his or her normal duties. For some employees at least this required them to come to work early, stay late or go to the plant on a day off to get the required signatures for a qual card (Tr. 68, 79).

In about February 2018, a year before the Charging Party Union filed a representation petition, Les Knudson, the senior AGT official[3] at Minot informed employees that AGT was losing money and that therefore there would be no annual wage increases.[4] Respondent also froze hiring. However, it did not suspend the qual card program.

Nevertheless, Knudson feared that a strict policy of no annual merit wage increases, and no hiring would result in his not

[7] *Somerset Welding*, supra, 304 NLRB at 47.

[8] We note that the General Counsel neither alleged nor established any additional facts that would indicate that the Respondent's halting of performance reviews was motivated by antiunion animus. Cf. *Pacific Southwest Airlines*, supra, 201 NLRB at 648.

[1] Some employees on this chart, such as Rebecca Irmen, are clearly not bargaining unit employees.

[2] The General Counsel does not allege there is anything illegal about the qual card program. AGT paid maintenance employees more than machine operators, i.e., $1 for each qual card as opposed to 50 cents for machine operators.

[3] Knudson's title is Division Head for Ingredients Operations.

[4] One meeting at which Knudson conveyed this message was attended by witness Madison Wigness and 20–30 other employees.

having enough employees to run the plant. He got permission from corporate officials in Regina, Saskatchewan to grant raises to some employees. The hiring freeze was also lifted at the Minot facility.

The Union filed a petition to represent all full-time and regular part-time production and maintenance employees and plant clerical employees at Respondent's Minot facility on February 15, 2019. Management became aware of the Union's organizing drive about a month before that. A representation election was scheduled for March 8, 2019, but was never conducted. This was apparently due to charges filed by the Union that were different than the one at issue in this case. Since the filing of the representation petition, Respondent stopped giving annual performance reviews and the merit increases associated with these reviews. However, it has continued giving wage increases pursuant to the qual card program.

Company officials have told some employees that it cannot give annual merit wage increases due to the pendency of the Union's representation petition. At a safety meeting in August or September 2019, Les Knudson told employees that such raises could be misconstrued as a bribe. Knudson contrasted annual merit raises with the qual card program, stating that Respondent could continue with qual card raises because Respondent had been consistent in administering the program (Tr. 97).

Specifically, with regard to annual evaluations, at a mandatory meeting in March 2019, Ricardo Pasalagua told employees that Respondent was looking to get performance reviews back on track (Tr. 68). Les Knudson has told employees that annual performance reviews will be resumed once the union representation issue has been resolved (Tr. 125–126). This position has also been taken in intra-company management communications (Tr. 70–71).

The record evidence regarding annual wage increases

Knudson testified that about 30 percent of the work force received an annual wage increase in 2018. The record, however, reflects that a much higher percentage of the employees eligible for a merit raise based on an annual review received one in 2018.

There are several documents in this record pertaining to Respondent's practices regarding performance reviews and wage increases prior to the union campaign in addition to General Counsel's Exhibit 20. One is an analysis done by counsel for the General Counsel the day prior to the hearing of documents he reviewed regarding current employees (GC Exh. 4). The other, Respondent's Exhibit 1, is a summary finished by Respondent's management the night before the hearing regarding the wage history at the Minot plant. Unlike General Counsel's Exhibit 4, this document includes information about performance reviews and wage increases of employees who have since been terminated. This is very significant because Respondent has an extremely high turnover rate in its work force. Many employees work for it for a very short period of time. Respondent's Exhibit 1, however, does not distinguish between bargaining unit employees and employees who are not unit members.

My analysis of these documents indicates that most employees eligible for an annual performance review in 2018 received one and most received a wage increase as a result.[5] However, there is no indication, with one exception, as to why other employees did not get a review and/or a wage increase.

Jeffrey Aamot received a $3 wage increase as the result of his annual review in May 2018.

David M. Anderson received a 50 cent per hour wage increase as a result of his review in June 2018.

Shawn Arndt received a 50 cent increase based on his July 2018 annual review.

Chad Badke appears to have received neither a review nor a wage increase in 2018.

Richard Bagwell received a 50 cent raise based on an annual review in June 2018.

Libby Bennefield got a review and a raise in about June 2018.

Brady Betterley received neither a review nor a raise in 2018.

Kelsey Beyer had a review in April 2018 but no raise.

Steven Carey received a raise in June 2018 based on an annual review.

Morgan Cummings got a 50 cent increase in November 2018 based on an annual review.

Mark Davis received neither a review nor a raise in 2018.

Sunshine Duchaine received a $ 1 raise based on a performance review in June 2018.

Charles Epunou, a shift supervisor, got a $1 raise based on a June 2018 review.

Robert Fardella received neither a review nor a raise in 2018.

Mitzie Fleming received a $1 raise in May 2018 as the result of a combined 90-day and annual review.

Jose Forty-Penero received neither a review nor a raise in 2018.

Justin Green got a $1 raise in May 2018 based on an annual review.

Travis Henderson received a $3.50 raise based on an annual review in July 2018.

Michael Houmann got a $1.50 raise based on an annual review in August 2018.

Windson Jean-Georges, a leadman, received a 50 cent raise based on an annual review in August 2018.

Demerio Johnson received a 50 cent increase based on an annual review in September 2018.

Timothy King got a 50 cent increase in June 2018 based on an annual review.

Sarah Kropp received a $1 increase in May 2018 based on an annual review.

Sydney Mauti had an annual review in March 2018 and a wage increase of 50 cents in May 2018.

Victor Magaka also had a review in May 2018 but got no raise.

Oscar Monroy had no review and no increase in 2018.

[5] I have excluded from consideration the 90-day review and wage increases received by relatively newly hired employees.

Logan Morrison received a $2 raise in May 2018 based on an annual review.

Bob Muhindi did not receive a raise or a review in 2018.

Joshua Ofsthun received a 50 cent raise based on an annual review in August 2018.

Gilbert Ogendi had neither a raise nor a review in 2018.

Romulo Ortiz had a review in April 2018, but did not receive a raise.

Denise Pardon received a $1 raise based on an annual review in June 2018.

David Rabe received a $1 increase in May 2018 based on an annual review.

Micah Reichenberger received a $3 increase in May 2018 based on an annual review.

Bartin Richard got a $1 increase in June 2018 based on an annual review.

Lorraine Romans did not get a performance review or a raise in 2018.

Craig Sauer apparently was hired, left AGT and returned between January 2018 and January 2019. He received 90-day reviews and raises on both occasions.

Seth Skager received a $1 raise in May 2018 based on an annual review.

Chelsea Smith received a 25 cent increase in June 2018 based on an annual review.

Shawn Thompson had neither a review nor received a raise in 2018.

Ramon Ventenilla got a 75 cent raise in May 2018 based on an annual review.

Phil Waltz, a leadman, had an unfavorable performance review in April 2018 and did not received a raise.

Madison Wigness had a review in April 2018, but did not receive a raise.

There is no evidence in this record that Knudson ever informed employees generally that some would receive merit-based raises in 2018 or 2019 after his earlier announcement to the contrary.

Analysis

When a representation petition is pending, an employer must act as if the union is not on the scene. Essentially, it must maintain the status quo. *Kauai Coconut Beach Resort,* 317 NLRB 996, 997 (1995). *NLRB v. Otis Hospital,* 545 F.2d 252 (1st Cir. 1976). Thus, while a representation petition is pending, an employer violates the Act if it withholds wage increases that are an established past practice, *Olney IGA Foodliner,* 286 NLRB 741, 750 (1987), enfd. 870 F.2d 1279 (7th Cir. 1989); *Rural/Metro Medical Services,* 327 NLRB 49, 51 (1998). In order not to unfairly influence a union election, the employer must maintain the pre-union *status quo* respecting employee benefits. Expectations of upcoming benefits created by the employer either by promises or through a regular pattern of granting benefits cannot be disappointed without proof of a union-neutral justification. *Southern Maryland Hospital Center v. NLRB.,* 801 F.2d 666, 668–669 (4th Cir.1986); Robert A. Gorman, Basic Text on Labor Law at 168 (1976).

A merit wage program is a term and condition of employment when it is an established practice, regularly expected by employees. Factors relevant to this determination include the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof, Another factor in considering whether wage increases, but not necessarily other types of benefits, are an established practice is whether they were granted at predictable intervals, *Rural/Metro Medical Services,* supra.[6] *Atlanticare Mgmt., LLC d/b/a Putnam Ridge Nursing Home,* 369 NLRB No. 28 fn. 6 (2020).

Often determining what constitutes the status quo is difficult and an employer runs the risk of being accused of unfair labor practices regardless of whether it continues to give employees a benefit or withholds that benefit. An employer is allowed to delay continuing a benefit in some circumstances to avoid giving the appearance of interfering with a representation election. The employer is also allowed to tell employees that a benefit is being deferred until after the representation election is concluded if it makes clear that the benefit will be conferred regardless of the outcome of the representation election.

With regard to the annual wage increases, I find that Respondent did not violate the Act by failing to continue them in 2019. AGT publicly abandoned its annual merit wage increase program in early 2018. While it gave a lot of employees merit increases later in the year, the record does not indicate the criteria by which AGT determined which employees received such a raise and how much. For example, there is no indication in this record as to why witnesses Wigness and Betterley did not receive a raise in 2018, when other employees did. Moreover, the timing of these increases is too erratic for them to be a condition of employment.

However, I conclude the opposite with regard to the annual performance reviews. These occurred every year almost always in the spring. Thus, they became a material condition of employment. Even without the corresponding wage increase the performance review is important for letting employees "know where they stand" (Tr. 77–78). A performance evaluation can be an important tool for job security. For example, in unfair labor practice cases it is sometimes the inconsistency with a performance review after an employee engages in protected activity, compared with prior reviews, that is determinative of discriminatory motive. In other cases, prior performance reviews indicate that an employer tolerated substandard performance until the employee engaged in protected activity.

An employer, at least in some instances, can comply with the Act by assuring employees that a benefit will be restored regardless of the outcome of the representation election. Respondent did not do that in this case. Thus, I find it violated Section 8(a)(3) and (1) in ceasing its established practice of giving annual performance reviews after the Union filed its representation

[6] There appears to be no difference as to whether or not a benefit is an established practice in 8(a)(1) cases compared with 8(a)(5) or representation cases. *Rural/Metro Medical Services* is an 8(a)(1) case; *Atlanticare Management* is a Sec. 8(a)(5) case. *Kauai Coconut Beach Resort* involved objections filed after a Board election.

petition.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, United Pulse Trading, doing business as AGT Foods, Minot, North Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discontinuing its established practice of giving unit employees annual performance reviews.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Renew its practice of giving annual performance reviews in 2020.

(b) Within 14 days after service by the Region, post at its facility in Minot, North Dakota, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2019.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2020

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT cease our established past practice of giving you annual performance reviews because Local 167G of the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union has filed a petition to represent you.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL resume our past practice of giving you annual performance reviews in 2020.

UNITED PULSE TRADING, D/B/A AGT FOODS

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-242003 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."